

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition of Image Access, Inc.)	
d/b/a New Phone for Declaratory Ruling)	
Regarding Incumbent Local Exchange)	WC Docket No. 06-129
Carrier Promotions Available for Resale)	
Under the Communications Act of 1934)	
As Amended, and Sections 51.601 et seq.)	
Of the Commission's Rules)	

**COMMENTS OF SOUTHEAST TELEPHONE, INC. IN SUPPORT OF
NEWPHONE'S PETITION FOR DECLARATORY RULING**

SouthEast respectfully submits these comments, pursuant to the Federal Communications Commission's ("Commission") *Public Notice* released on July 10, 2006 (06-1421), in support of the Petition for Declaratory Ruling filed on June 13, 2006, by Image Access, Inc. d/b/a ("NewPhone") in the above referenced docket.

NewPhone, in its petition, asks the Commission to declare the following:

- an incumbent local exchange carrier's ("ILEC") refusal to make cash-back, non-cash-back, and bundled promotional discounts available for resale at wholesale rates is unreasonable restriction on resale and is discriminatory in violation of the Act and the Commission's rule's and policies;
- for all promotions greater than 90 days, ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion;

- the effective retail rate for a giveaway or discount shall be determined by subtracting the face value of the promotion from the ILEC-tariffed rate for the service that is the subject of the promotion, and the value of the discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months;
- for all ILEC promotions greater than 90 days. ILECs shall make available for resale the telecommunications services contained within mixed-bundle promotion (promotion consisting of both telecommunications and non-telecommunications services) and apply the wholesale avoided cost discount to the effective rate of the telecommunications service contained within the mixed bundle;
- the effective retail rate of the telecommunications service component(s) of a mixed-bundle promotion shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the bundle if added together at their retail, unbundled component prices; and
- telecommunications carriers shall be able to resell ILEC promotions greater than 90 days in duration as of the first day the ILEC offers the promotion to retail subscribers.¹

SouthEast Telephone respectfully submits that the Commission should grant NewPhone's

Petition in its entirety.

I. INTRODUCTION

Section 251(c)(4) mandates that ILECs have the duty to offer for resale at wholesale any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Furthermore, ILECs are directed not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications services.² The Telecommunications Act of 1996, with the inclusion of the resale requirement,

¹ Petition of NewPhone for Declaratory Ruling, WC Docket No. 06-129 (filed June 13, 2006) ("NewPhone Petition").

² 47 U.S.C. 251(c)(4).

sought to ensure a method of competitive entry into the local exchange market. It is counter-intuitive to exempt discount or promotion offerings from the resale obligations and “would permit incumbent LECs to avoid statutory resale obligations by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.”³

The Commission also sought to protect competition in an order released December 23, 1999 (the “*Arkansas Preemption Order*”). In this order, the Commission preempted a provision of the Arkansas Telecommunications Regulatory Reform Act of 1997, concluding that they unlawfully erected barriers to entry into local telephone service markets in Arkansas.⁴⁸ The *Arkansas Preemption Order* preempted a section of the Arkansas Act that permitted an incumbent company to make bundled retail service offerings unavailable to competing carriers at wholesale rates. The Commission concluded that this provision conflicted with the rules governing resale in the 1996 Act.⁴

SouthEast concurs with NewPhone’s position that BellSouth’s blatant practice of refusing to make its retail bundled service offerings available for resale at the wholesale rate, and its continued failure to include the same discount or promotion offered to retail customers in its wholesale offerings to requesting carriers pursuant to § 251(c)(4) of the 96 Act, equate to discriminatory conditions or limitations prohibited by the Act and Commission’s rules.

³ *Local Compensation Order*, ¶948.

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carrier and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 1, ¶948 (rel Aug. 8, 1996) (“*Local Competition Order*”).

II. RESALE IS STILL A CRITICAL ELEMENT OF LOCAL EXCHANGE COMPETITION

In enacting the 1996 Act, Congress understood the critical role resale would play for competitive entry into the local exchange market. The telecommunications market landscape was to be protected by two (2) distinct obligations placed upon the different carriers by the Act. First, § 252(b)(1) of the Act, directed that no local exchange carriers (LECs) shall “impose unreasonable or discriminatory conditions or limitations on [] the resale of its telecommunications services.”⁵ The ILECs and RBOCs, however had additional resale obligations unique only to them. Section 251(c)(4) and 271(c)(2)(b)(xiv), apply only to ILECs and RBOCs respectively. Section 251(c)(4) requires ILECs:

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) ***not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service***, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.⁶

⁵ 47 U.S.C. §251(b)(1)

Section 271(c)(2)(B)(xiv) provides that, in order for a Bell Operating Company to provide in-region interLATA services, it must offer telecommunications services for resale in accordance with §251(c)(4) and the avoided cost pricing standard set out in §252(d)(3).⁷

In a continued commitment to the importance of resale, in the *Qwest Forbearance Order*, the Commission denied Qwest’s petition for forbearance from the resale obligations of §251(c)(4).⁸ The Commission stated that “Qwest has not persuaded us that §251(c)(4) resale is no longer necessary in the Omaha MSA to ensure reasonable and nondiscriminatory pricing, and ensure that customers’ interests are protected ...[W]e conclude that §251(c)(4) resale obligations are necessary to existing competition and makes future competitive entry possible.”⁹

Resale is even more crucial, given the Commission’s recent rulings limiting ILEC unbundling obligations. As stated in the NewPhone petition, “In order to ensure that resale remains a viable alternative for competitors and consumers, the Commission must declare *inter alia* that ILECs are required under the Act and the Commission’s rules to apply the wholesale avoided cost discount to the “effective”

⁶ 47 U.S.C. §251(c)(4) (emphasis added).

⁷ 47 U.S.C. §271(c)(B)(xiv). 47 U.S.C. §252(d)(3) states, in pertinent part, “a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”

⁸ *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170, rel. Dec. 2, 2005, ¶63 (“*Qwest Omaha Forbearance Order*”).

⁹ *Id.*, ¶88.

retail rate of the telecommunications service(s) which are the subject of the ILEC's cash-back, non-cash back, and mixed service bundle promotions.”¹⁰

III. BELL SOUTH'S RESALE PRACTICES VIOLATE THE 96 ACT AND THE COMMISSION'S RULES AND POLICIES

1. Cash-Back Promotions, Checks, Gift Cards, Coupons and Similar Giveaways

SouthEast agrees with NewPhone's explanation of BellSouth's discriminatory practices in that “BellSouth discriminates against its resale competitors via the use of cash-back and non-cash back promotions made available exclusively to its end-user retail subscribers (and not to resellers), which effectively reduces the price of the telecommunications service purchased by the subscribers by the value of the promotion.”¹¹ In essence, BellSouth makes the services within the promotion available for resale at the applicable state commission avoided cost discount rate, however, BellSouth does not provide resellers with the value of the promotional discount that it provides its own end-users, nor does BellSouth apply the state commission

¹⁰ NewPhone Petition at 12.

¹¹ *Id.*, at 13.

approved wholesale avoided cost discount to the “effective retail rate” (the tariffed retail rate minus the value of the promotional discount) of the telecommunications services offered for resale. According to NewPhone, “BellSouth’s extensive use of these cash-back and non-cash-back promotions enables it to disguise promotional price discounts to its subscribers and undercut the price at which resellers are able to offer customers the same service.”¹²

2. Mixed Bundles

The second type of promotion that BellSouth utilizes to discriminate in an attempt to eliminate its resale competition are promotions lasting more than 90 days in which BellSouth offers a mixed service bundle, consisting of both a telecommunications service and a information service. NewPhone insists that BellSouth is also utilizing mixed serviced bundled service.¹³ NewPhone explained in their petition that it is BellSouth’s contentions that the telecommunications service incorporated into a mixed service bundle is not subject to the ILEC’s resale obligations. Therefore, to definitively decide this issue, the Commission must clarify that ILECs must offer the telecommunications service components of bundled offerings at the wholesale rate for resale. The Commission must also

¹² In some cases, BellSouth’s cash-back offers may result in a situation where the effective retail price of the service is below BellSouth’s cost. *See Local Competition Order*, 11 FCC Rcd at 15973, ¶956 (requiring ILECs to apply the wholesale discount on services at below cost levels).

¹³ NewPhone Petition at 18.

clarify that the retail rate, to which the wholesale avoided cost service discount is applied, must reflect the portion of promotional discount applicable to the telecommunications service. In the alternative, the ILEC must make the entire mixed bundled offering available at wholesale rates.

SouthEast agrees with the NewPhone position that “BellSouth’s practices concerning the resale of mixed bundle promotions violate both the Act and the Commission’s rules.”¹⁴ As discussed earlier, §251(c)(4)(B) of the 1996 Act and §51.605(e) of the Commission’s rules prohibit ILECs from imposing unreasonable or discriminatory conditions or limitations on telecommunications available for resale, or refusing in the first case to provide telecommunications services for resale. In the *Arkansas Preemption Order*, the Commission clearly stated that its rules require the availability, at wholesale rates to competing providers, of “*all* bundled retail service offerings.”¹⁵

IV. CONCLUSION

The Commission, beginning with the 1996 Act has recognized the necessity of resale in a competitive telecommunications marketplace. The Commission has twice reinforced their belief in the necessity of ILEC resale obligations, first in the *Arkansas Preemption Order*, and

¹⁴ *Id. at 18.*

¹⁵ *Arkansas Preemption Order*, ¶47. (Emphasis Added)

most recently in the *Qwest Petition for Forbearance*. In the current regulatory environment

where the ILECs are being released of many if not most of their unbundling obligations,

it is critical that the Commission act to preserve the resale obligations of the ILECs and RBOCs.